Supreme Court, U.S.
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No. 90-1276

In the Supreme Court of the United States

OCTOBER TERM, 1990

ARTHUR FRANK MILLARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may recover from the United States moneys that were garnished, pursuant to 42 U.S.C. 659, from his military and retirement pay and paid over to his former wife under a facially valid California child-and-spousal-support order.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-44a, is reported at 916 F.2d 1. The opinion of the Claims Court, Pet. App. 49a-73a, is reported at 16 Cl. Ct. 485.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1990. A petition for rehearing was denied on November 13, 1990. Pet. App. 46a-47a. The petition for a writ of certiorari was filed on February 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retired Lieutenant Colonel of the United States Army. On December 9, 1983, while petitioner was still in the Army, his former spouse obtained an order of arrearage for child and spousal support from the California Superior Court in San Francisco. Prior to the entry of the order, petitioner was personally served and provided with an opportunity to appear for a hearing, but did not do so. Subsequently, petitioner's former spouse obtained a wage assignment order from the California court. The order assigned a portion of petitioner's salary or wages and made it payable to petitioner's former spouse in the amount of $300 per month for child support, plus $700 per month for 21 months in satisfaction of petitioner's $14,414 arrearage. Pet. App. 8a-9a, 75a-80a.

The wage assignment order was served upon the United States Army, petitioner's employer. In compliance with the order and 42 U.S.C. 659, the Army began making deductions from petitioner's monthly pay effective October 1, 1984.[1] At that time, petitioner was on active duty in Georgia. Although petitioner received notice of the garnishment from the

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[1] Garnishment of the wages of federal employees for alimony and child support payments is authorized by 42 U.S.C. 659, which provides, in pertinent part:

> Notwithstanding any other provision of law * * * moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States * * * to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States * * * were a private person, to legal process brought for the enforcement against such individual of his legal obligations to provide child support or make alimony payments.

government in early October 1984, the first deduction was made before he received such notice. At no time, however, did petitioner attempt to challenge the arrearage or wage assignment orders in the California courts. Pet. App. 10a, 35a, 51a-52a.

Instead, petitioner attacked the deductions before the Army Board for Correction of Military Records. That body ruled that the Army was required by 42 U.S.C. 659 to honor the wage assignment order, and it advised petitioner that his challenge had to be made in the Superior Court of California. Nevertheless, petitioner continued his collateral attack upon the California court orders, first before the Comptroller General, then in the courts below. Pet. App. 10a, 54a.

2. In May 1988, petitioner instituted this action in the United States Claims Court, seeking to recover moneys garnished from his active duty and retirement pay and paid to his former wife under the California court orders. The Claims Court granted the government's motion for summary judgment, and dismissed the complaint. The Claims Court noted that 42 U.S.C. 659(f) provides that the United States is not liable for any garnishment payment made "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." The court rejected petitioner's two main contentions that subsection (f) was not applicable here. Pet. App. 56a, 60a, 66a-71a, 73a.

First, the court concluded that, contrary to petitioner's view, the California order satisfied the requirement of being "regular on its face." Citing *United States* v. *Morton*, 467 U.S. 822 (1984), the court stated that to qualify as "regular on its face,"

the order must simply be "legal process whose validity, facially judged, appears to evidence a legitimate exercise of jurisdiction on the part of the issuing authority." Pet. App. 60a-61a. Applying that principle, the court found the order to be valid because nothing on its face "provides reasonable notice that it was issued without authority of law"; rather, the order bore all the indicia of an authentic, valid court order. *Id.* at 61a-66a.

Next, the court rejected petitioner's claim that certain alleged violations of 42 U.S.C. 659 and its implementing regulations exposed the United States to liability for honoring the garnishment order. The court concluded that the order adequately identified the United States as its recipient under the applicable regulation, 5 C.F.R. 581.202(a), and it held that the government's failure (if any) to comply with 42 U.S.C. 659(d) by giving petitioner notice within 15 days after the garnishment order was served on it did not cause any prejudice to petitioner. Pet. App. 66a-71a.

3. The Federal Circuit affirmed. The court noted that two issues were raised by petitioner's claim that the government improperly withheld wages and retirement pay under a garnishment order. First, the court stated that, because 42 U.S.C. 659(a) establishes the government's obligation to comply with a garnishment order "in like manner and to the same extent as if the United States * * * were a private person," petitioner had to establish that the government, as garnishee, "would be liable to the plaintiff under state law" for having complied with the writ. Pet. App. 14a.[2] Second, the court said, if state law

[2] The court explained: "[T]he government cannot be held liable in a suit for the wages paid or not paid under the

did not protect the government, the government may nevertheless be immune from liability "because of the exculpatory provision, [42 U.S.C.] 569(f)." *Ibid.*[3]

Although, in the court's view, the record here did not establish that the express immunity in 42 U.S.C. 659(f) was available, the court rejected petitioner's claim because in the circumstances of this case, California law would not have imposed liability on a garnished private employer. Pet. App. 12a-13a, 16a-17a, 41a-44a.

The court began by finding that the wage assignment order was "regular on its face." After attempting to structure petitioner's "confusing array of arguments," the court determined that the order was not void for failing to reveal whether the California court had personal jurisdiction over petitioner, that the United States was amenable to the jurisdiction of the California courts for garnishment purposes, and that the United States' compliance with a facially

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[garnishment] writ in circumstances in which a private employer would not be held liable. If state law exculpates an employer, that ends the challenge against the United States as far as any claim based on garnishment principles [is concerned]." Pet. App. 14a.

[3] The court explained that Section 659(f) largely parallels the protection available to a garnishee under state law. Under generally applied state law, "an employer who honors a writ 'regular on its face' issued by a court of competent jurisdiction, who is properly served, and who gives notice to the employee so that the employee may timely challenge the garnishment has no further duty to the employee." Pet. App. 16a-17a (footnote omitted). Section 659(f) generally embodies those requirements, but the provision "is narrower in that the statutory immunity * * * is also conditioned on the government's compliance with" the provision and its implementing regulations. Pet. App. 18a.

valid garnishment order did not raise due process concerns.[4] Pet. App. 19a-25a.

The court also rejected petitioner's contention that the wage assignment order did not comply with 5 C.F.R. 581.202(a) because it named the "employer" as garnishee, rather than specifically naming the Army as the governmental entity to be garnished. The court explained that because California law includes the United States as an "employer," the government's conclusion that its regulation was satisfied by a wage assignment order directed to the "employer" was reasonable. Pet. App. 29a-30a.

Finally, the court found that for purposes of the government's motion for summary judgment, the present record did not establish that the government had complied with the requirement of 42 U.S.C. 659 (d) that notice be given to the employee within 15 days after the government was served with the garnishment order. But the court concluded that because petitioner received notice shortly thereafter, and had never sought relief in the California court even after receiving notice, he was not prejudiced by the late notice. Pet. App. 32a-35a. Absent prejudice, "the United States would, * * * like any other employer, not be liable to its employee under state law." *Id.* at 41a.

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[4] The court explained that any of petitioner's "due process rights in having a money judgment entered against him, if violated, would have been violated by the California court that issued the order[,] not the United States which merely complied with the order as it was required to do." Pet. App. 25a. The court added that "it is undisputable that the California court provide[d] full opportunity for [petitioner] to challenge the arrearage judgment and would, in addition, have entertained a motion to quash the wage assignment." Pet. App. 25a-26a. Petitioner, however, "simply failed to avail himself of his rights." *Id.* at 26a.

ARGUMENT

The Claims Court and the Federal Circuit took different routes to their decisions, but each court found that the United States had acted properly in making deductions from petitioner's pay and retirement checks pursuant to a California state court wage assignment order. The Claims Court concluded that the United States was expressly immunized from liability under 42 U.S.C. 659(f), while the Federal Circuit concluded that under conventional state law principles of garnishee liability, the Army acted properly by giving petitioner notice of, and honoring, a state court garnishment order that was "regular on its face." Despite petitioner's myriad of arguments to the contrary, the decision below rejecting his collateral attack on the state court garnishment order is correct and presents no issue worthy of this Court's review.

1. In 1974, Congress lifted the sovereign immunity of the United States to allow garnishment of the wages of federal employees and retirees for specific purposes. As one of several measures taken to facilitate the collection of alimony and child support, Congress enacted 42 U.S.C. 659, which partially waives soverign immunity and allows garnishment of federal salaries, pursuant to "legal process" to collect alimony and child support payments, "in like manner and to the same extent as if the United States * * * were a private person." 42 U.S.C. 659(a).[5] The purpose of Section 659 is "to remedy the plight of persons left destitute because they had

[5] The term "legal process" is defined to mean "any writ * * * or other similar process in the nature of garnishment" that, among other things, "is issued by * * * a court of competent jurisdiction." 42 U.S.C. 662(e)(1).

no speedy and efficacious means of ensuring that their child support and alimony would be paid." *United States* v. *Morton*, 467 U.S. at 833.[6]

Three years later, Congress added subsection (f) to Section 659; this subsection provides that neither the government nor its disbursing officers may be held liable for amounts paid "pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section." 42 U.S.C. 659(f) (added by Tax Reduction and Simplification Act of 1977, Pub. L. No. 30, Tit. V, § 501(a), 91 Stat. 157). In *Morton*, this Court held that under 42 U.S.C. 659(f), the United States could not be held liable for honoring a garnishment writ regular on its face and issued by a court with subject matter jurisdiction, whether or not the issuing court actually had personal jurisdiction over the defendant in a particular case. 467 U.S. at 834-836. The Court explained that "[i]nquiry into the issuing court's jurisdiction over the debtor cannot be squared with the plain language of the statute, which requires the recipient of the writ to act on the basis of the 'face' of the process." *Id.* at 829.

As the Federal Circuit pointed out, although subsection (f) provides one source of immunity from liability, "the government need not resort to exculpation under Section 659(f) if it would not be liable to its

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[6] Under 42 U.S.C. 661, the Office of Personnel Management has issued regulations implementing Section 659. These regulations provide that federal disbursing agents must comply with a writ of garnishment, except in certain enumerated circumstances, such as where there are jurisdictional defects apparent on the face of the order of garnishment or where the garnishment is not for alimony or child suport. 5 C.F.R. 581.305(a)(1). None of those enumerated circumstances for disregarding a garnishment writ exists, or is alleged to exist, in this case.

employee under state law." Pet. App. 18a. The court explained that this was so because Section 659(a) "subjects the United States to liability in connection with garnishment only 'in like manner and to the same extent as if the United States were a private person.'" *Ibid.* Because Section 659(a) obligates the United States to honor a writ of garnishment to the same extent that state law requires a private person to do so, if the United States complies with that provision, it has fully discharged its salary obligations to an employee, and cannot be held liable for improperly withholding salary payments. See *United States v. Morton*, 467 U.S. at 832-833.

2. In this case, petitioner makes a variety of attacks on the government's decision to honor the garnishment order of the California court, but fails to come to grips with the essence of the holding below: because the government acted in compliance with California law in honoring the garnishment writ, it fully discharged its "debt" to petitioner. Petitioner's claim (Pet. 39-41) that a similarly situated private employer would be liable on the facts of this case rests entirely upon his contention that the garnishment order is void under California law, and therefore unenforceable. But California law does not render the garnishee responsible for the validity of an order underlying a writ of garnishment; rather, as the court of appeals explained (Pet. App. 17a), "[t]he employer's payment of wages due the employee in accordance with the order of such court discharges the employer's debt to the employee."[7] Petitioner's ob-

[7] Generally established principles of garnishment reflect the same rule. See *Morton*, 467 U.S. at 832 ("It has long been the rule that at least when the obligor receives notice of the garnishment, the garnishee cannot be liable for honoring a

jections to the validity of the support enforcement orders must be raised before the court that issued them—not in an action against the United States for the moneys garnished. As the court of appeals correctly noted, petitioner had an adequate opportunity to challenge the California judgment assigning his wages, but "simply failed to avail himself of his rights." *Id.* at 26a.[8]

The wage assignment order was not irregular on its face simply because it was made against a nonresident. Pet. 22, 26-28. To contend otherwise resurects the claim rejected in *Morton* that the government must ascertain whether the court had personal jurisdiction over the debtor before complying with a writ of garnishment. In this era of "ubiquitous long-arm statutes," Pet. App. 21a, there are any number of bases for a state court to gain personal jurisdiction over a nonresident.[9] The United States is not required

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writ of garnishment. See *Harris* v. *Balk*, 198 U.S. 215, 226-227 (1905).").

[8] For that reason, this case does not present the issue reserved in *Morton*, 467 U.S. at 827 n.5, with respect to a debtor's rights against the United States where the debtor did not have an adequate opportunity to challenge the jurisdiction of the court issuing the garnishment order. Petitioner contends (Pet. 30-34) that he lacked an adequate opportunity because of the difficulty he would have in traveling from Georgia to California. But petitioner does not explain why a special appearance to contest personal jurisdiction would not provide an adequate opportunity to vindicate his claim. See *Kulko* v. *Superior Court*, 436 U.S. 84 (1978) (upholding nonresident's due process objections to jurisdiction, after nonresident made a special appearance).

[9] California, like other jurisdictions, has long-arm statutes. Pet. App. 21a, citing Cal. Civ. Proc. Code § 410.10 (West 1984). Many nonresidents will have the requisite "mini-

to look behind every garnishment order involving an out-of-state debtor to determine whether personal jurisdiction was wanting.

Petitioner also argues (Pet. 22-25) that the wage assignment order was not regular on its face because it did not specifically name the United States. Under 5 C.F.R. 581.202, a garnishment order served on the government is to "name[] the government entity as the garnishee." But even though the garnishment order here did not specifically name the United States as petitioner's employer, California law expressly defines "employer" to include the United States, Pet. App. 29a, and the garnishment order was directed to petitioner's "employer." *Id.* at 79a. The Army's reading of its regulation to encompass the reference involved here is entitled to "substantial deference." *Martin* v. *Occupational Safety & Health Review Comm'n*, No. 89-1541 (Mar. 20, 1991), slip op. 5; *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1985). In any event, as a result of this litigation the Office of Personnel Management (OPM) has issued a proposed rule clarifying the regulation "to make it absolutely clear that the Governmental entity need not be expressly named as the garnishee and thereby to avoid any future litigation on this issue." Summary, Proposed Rule, Processing Garnishment Orders for Child Support and/or Alimony, 56 Fed. Reg. 9181 (Mar. 5, 1991).[10]

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mum contacts" under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), to support personal jurisdiction in California.

[10] Under 42 U.S.C. 662(e)(2) legal process, for purposes of Section 659, means an order "directed to, and the purpose of which is to compel, a government entity" to garnish wages. That provision does not specifically require naming

Finally, the court of appeals correctly held that any violation of the notice provision of 42 U.S.C. 659(d) did not entitle petitioner to recover the garnished funds from the United States. Because there was compliance with the notice requirement as to all but the first deduction, 42 U.S.C. 659(f) provides a complete defense to all but the first $760.77 deducted before notice was provided. As the court of appeals concluded, Pet. App. 35a, it is "untenable" to argue that a failure to give timely notice of the first deduction made all subsequent deductions wrongful even though the lack of notice had been cured. Cf. *United States* v. *Montalvo-Murillo*, 110 S. Ct. 2072, 2079-2080 (1990). In any event, as both courts below found, because petitioner never sought any relief with respect to the garnishment order in the California courts, he was not prejudiced in any respect by the slight delay in receiving notice. Pet. App. 34a-35a, 70a-71a.[11]

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of the governmental employer in the order, and OPM's interpretation of the statute to contain no such requirement is a reasonable one. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

[11] As in the Claims Court, Pet. App. 72a n.7, and in the Federal Circuit, *id.* at 11a, petitioner's submission here raises "a plethora of issues dependent on various facts," *ibid.*, including claims that the California Civil Code is unconstitutional (Pet. 29); that 42 U.S.C. 659 unconstitutionally denies petitioner "access to the courts," substantive due process, and equal protection (Pet. 34, 36-37); and that payment of funds under the writ of garnishment here violates the Appropriations Clause of Article I of the Constitution (Pet. 39). Those claims do not warrant review. See also Sup. Ct. R. 14.5.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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